STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-21-43

FRIENDS OF MERRYMEETING BAY, KATHLEEN MCGEE, ED FRIEDMAN, and COLLEEN MOORE,

Plaintiffs-Appellants

v.

CENTRAL MAINE POWER COMPANY

Defendant- Appellee

On Appeal from Order of Business and Consumer Docket
Docket No.: BCD-CV-2020-36

BRIEF OF APPELLEE CENTRAL MAINE POWER COMPANY

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INTRODUCTION

In this appeal, a handful of private parties seek a ruling that a state court can order Central Maine Power Co. ("CMP") to defy the safety determination of the Federal Aviation Administration ("FAA") and take down the lights that the FAA said CMP should use on certain power line towers to prevent plane crashes. Before one even analyzes the law in detail, common sense suggests that this cannot be permissible. If the court orders CMP to take down the lights and then a plane crashes into the tower, would the passengers be without recourse? Would CMP instead be liable for not following the FAA guidance even though a court ordered it not to follow that guidance? Neither of these outcomes can be right, and the law of preemption is in accord: in the face of such a conflict, state tort law must give way.

STATEMENT OF FACTS

I. CMP has constructed two tall towers marked by safety lights that use a radar system to activate only when aircraft are present.

In 2019, CMP replaced two utility towers that support power lines across the Chops Passage of the Kennebec River as the river flows into Merrymeeting Bay. (A. 45) The old towers were 195-feet tall, and the new towers are approximately 240-feet tall. (A. 49, 50) The towers are outfitted with safety lights that flash to alert aircraft to the presence of the towers. (A. 52) In response to concerns from residents about having continuously flashing lights, CMP, at significant cost, equipped the towers with an Active Aircraft Detection Lighting System (the "Radar System") that

uses radar to trigger the lighting only when aircraft are present, thus limiting the flashing as much as is safe. (A. 67)

II. The FAA and FCC approved the radar-activated lighting system.

On March 12, 2018, the FAA, after conducting an extensive process required by regulation, *see* Argument Part I.A.1 *infra*, issued a "determination of no hazard to air navigation" with respect to the towers. (A. 114, 122) The no hazard determination explained that the FAA had conducted an aeronautical study, which "revealed that the structure does not exceed obstruction standards and would not be a hazard to air navigation provided the following condition(s) are met: As a condition to this Determination, the structure is to be marked/lighted in accordance with FAA Advisory Circular 70/746001 L Change 1, Obstruction Marking and Lighting, a med-dual system – Chapters 4, 8,(M-Dual),&12" (the "FAA Safety Lighting Standards").[1] (A. 52, 119-23 (emphasis added))

On March 25, 2020, in response to a revised submission by CMP to cover the use of the Radar System, the FAA issued a new determination of no hazard, again explaining that it had conducted an aeronautical study and concluded that there would be no air hazard "provided the following condition(s) are met: As a condition to this Determination, the structure should continue to be marked/lighted utilizing a med-dual system" (the "Conditional NHD") (A. 52, 127-28) In issuing the Conditional

[1] The FAA Safety Lighting Standards are available at https://www.faa.gov/documentLibrary/media/Advisory_Circular/AC_70_7460-1L_with_chg_1.pdf.

NHD, the FAA expressly provided that the towers are "subject to the licensing authority of the Federal Communications Commission" ("FCC"). (A. 128) The FCC subsequently issued the necessary license. (A. 131-32)

III. Appellants brought nuisance claims based on the lighting system approved by the FAA and the FCC.

Appellants are three individuals who reside in the vicinity of the towers, plus a non-profit conservation group. On July 21, 2020, Appellants filed a complaint in Superior Court, advancing state law nuisance claims. (A. 71, 73) Appellants challenged the lighting mechanism specified as a condition of the FAA's Conditional NHD, alleging that the flashing lights have a negative effect on enjoyment of their property and the economic value of properties in Merrymeeting Bay. (A. 65-66) Appellants also challenged the radar system designed to ameliorate any effects of the flashing, asserting that the radiofrequency emissions caused harm to wildlife in Merrymeeting Bay and could aggravate the physical health of one Plaintiff. (A. 67-70)

IV. The trial court dismissed all claims as preempted by federal law.

The trial court granted CMP's motion to dismiss the complaint with prejudice on the basis of federal preemption. (A. 44) Regarding the lighting, the court held "that Plaintiffs' state law nuisance action is subject to both field and conflict preemption." (A. 37)

The court first rejected Appellants' contention "that because the towers do not intersect navigable airspace, the FAA's regulatory authority fails to reach CMP's

towers." (A. 39) The court reasoned that the argument was "inconsistent with . . . the regulatory framework" given that the "FAA has authority over all airspace, not just navigable airspace, 49 U.S.C. § 40103," and given the requirement that an aeronautical study be conducted and a determination of hazard or no hazard to air navigation be made on the basis of the height and characteristics of the structure, and not on the definition of "navigable airspace" or the distance to any airport. (A. 39)

The court also rejected Appellants' argument that because the FAA does not claim the right to bring an enforcement action for non-compliance with a hazard determination, preemption cannot be established. The court explained:

> Instead of issuing enforceable orders, the FAA relies on other means to obtain compliance, and the federal statutory and regulatory scheme for managing air safety maintains its preclusive effect. For instance, a party could seek a common law remedy in state court for a defendant's *noncompliance* with FAA regulations and recommendations. However, the Court concludes that a common law action brought in state court is subject to conflict preemption when the injury described is a defendant's adherence to FAA guidance. A holding to the contrary would create an obstacle to the accomplishment and execution of the full purposes of Congress.

(A. 40)

Finally, the trial court dismissed Appellants' challenge to the radiofrequency emissions from the radar system, reasoning that it would not "substitute its assessment of potential RF-emissions related harms in place of the 'consensus view of the federal agencies responsible for matters relating to public safety and health.'"

(A. 44)

Appellants have appealed only that portion of the trial court's order addressing the lighting. (Brief of Appellant at n.1)

STATEMENT OF THE ISSUES

1. Would allowing a state law tort action seeking to remove safety measures that were an explicit condition of an FAA no hazard determination create an obstacle to the Federal Aviation Act's purpose of promoting air safety?
2. Does the extensive statutory authority for addressing airspace safety and the detailed process by which the FAA makes hazard determinations indicate an intent that federal law occupy the field of airspace hazard determinations for structures, as the FAA itself says?
3. Does a state law tort action that seeks to remove a safety measure specified by the FAA cease to be an obstacle to the Federal Aviation Act's purpose of protecting air safety just because the FAA obtains compliance with its determinations through moral suasion and the practical ramifications of its decisions rather than direct enforcement actions?
4. Does the FAA have jurisdiction to conduct no hazard determinations given the broad delegation of duties to the FAA and the existence of detailed regulations concerning no hazard determinations?
5. Does an article written by one individual that on its face says it is not FAA policy create a binding standard that CMP is to follow?

SUMMARY OF THE ARGUMENT

There is a direct conflict between the central premise of Appellants' nuisance action and the FAA's Conditional NHD – the Conditional NHD is expressly conditioned on the use of the very lights that the Appellants want the Court to order removed. As the trial court found, in the event of such direct conflicts between state and federal law, state law is preempted. *See, e.g., Puritan Med. Prods. Co., LLC v. Copan Italia S.p.A.*, 2018 ME 90, ¶ 13, 188 A.3d 853. In addition, as the FAA itself says, the extensive statutory authority for ensuring airspace safety and the detailed regulations setting out a process for making such assessment indicate an intent to occupy the field of airspace hazard determinations for structures. (A.139) All three arguments that Appellants make in challenging the trial court's straightforward application of preemption principles here are wrong.

First, the Conditional NHD is not some offhand suggestion that the FAA does not care if CMP follows. It is the product of a comprehensive regulatory scheme and it has significant real-world impacts, impacting financing, local zoning decisions, and the like. *Air Line Pilots Ass'n Int'l v. Dep't of Transp., F.A.A.*, 446 F.2d 236, 241 (5th Cir. 1971) ("To say…that the FAA's determination on the question of hazard is either practically, administratively, or legally insignificant is to ignore reality."). It does not decrease the level of interference with the federal scheme that the FAA relies on these real world impacts and "moral suasion" rather than direct enforcement authority to promote compliance with its determinations. A state court action seeking to compel

CMP not to follow the FAA's safety measures thus stands as an obstacle to the federal purpose of promoting airspace safety in exactly the same way whether there is direct enforcement authority or not – either way, the state court would be requiring non-compliance with the safety measure specified by the regulatory experts after extensive process in furtherance of their mission to promote airspace safety. *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 875 (2000). That is why Appellants can cite not a single case from anywhere in the country allowing a state to require removal of a safety measure specified as a condition of an FAA no hazard determination.

Second, the FAA plainly has authority to make the determinations that lead to preemption here. The plain language of the statute and decades of practice make clear that the FAA has broad authority to regulate airspace as necessary to ensure airspace safety. 49 U.S.C. § 40103. And common sense underscores the conclusion. If Appellants were correct that the FAA does not have jurisdiction to conduct safety assessments of towers that turn out not to be hazards so long as safety lighting is used, then it does not have jurisdiction to create the very condition that makes the structure safe and thus, according to Appellants, takes the tower out of its jurisdiction. That obviously cannot be.

Third, there is no claim here for non-compliance with the Conditional NHD. The "standard" with which Appellants say the flash rate conflicts is not part of the Safety Lighting Standards that are incorporated into the Conditional NHD. It is just

an article by one person that on its face says it is not FAA policy. (CMP Reply Brief on Motion to Dismiss, Exhibit A at p.2)

STANDARD OF REVIEW

The legal sufficiency of a complaint challenged by a motion to dismiss is a question of law that this Court reviews *de novo*. *Lawson v. Willis*, 2019 ME 36, ¶ 7, 204 A.3d 133. In conducting that review, this Court must consider whether the complaint "sets forth elements of a cause of action or alleges facts that would entitle the [Appellants] to relief pursuant to some legal theory." *Bonney v. Stephens Mem'l Hosp.*, 2011 ME 46, ¶ 16, 17 A.3d 123. While ordinarily a court may only consider the pleadings in reviewing a dismissal for failure to state a claim upon which relief can be granted, an exception to this rule permits courts to review "official public documents, documents that are central to the plaintiff's claim, and documents referred to in the complaint." *Estate of Robbins v. Chebeague & Cumberland Land Tr.*, 2017 ME 17, ¶ 2 n.2, 154 A.3d 1185.

ARGUMENT

The Supremacy Clause of the United States Constitution provides that federal law "shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. From this constitutional precept it follows that "Congress has the power to preempt state law." *Arizona v. United States*, 567 U.S. 387, 399 (2012). Preemption applies equally to all forms of state law,

including civil actions based on state tort law. *See, e.g., Puritan Med. Prods. Co., LLC*, 2018 ME 90 at ¶ 13, 188 A.3d 853 (holding a state law claim for bad faith assertion of patent infringement was preempted to the extent the state statute authorizing such claims applied a standard for bad faith that was less protective of patentee's rights than standard under federal law); *Buckman v. Plaintiffs' Legal Comm.*, 531 U.S. 341, 351 (2001) ("As a practical matter, complying with the FDA's detailed regulatory regime in the shadow of 50 states' tort regimes will dramatically increase the burdens facing potential applicants.").

Federal law can preempt state law in three ways: (1) express preemption, (2) field preemption, and (3) conflict or obstacle preemption. *Hillsborough Cnty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 713 (1985). While these three categories provide a useful structure to any preemption analysis, both this Court and the First Circuit have been mindful to take a "functional approach" to preemption, focusing not on "pigeonholing" the precise flavor of preemption, but "on the effect which the challenged enactment will have on the federal plan." *French v. Pan Am Exp., Inc.*, 869 F.2d 1, 2 (1st Cir. 1989); *Bayside Enter., Inc. v. Maine Agr. Bargaining Bd.*, 513 A.2d 1355, 1358 (Me. 1986) ("[W]e are mindful that judicial decision-making in the preemption area is ad hoc in nature, with the outcome in each case necessarily governed by the regulatory scheme and policy objectives of the particular statutes being reviewed.").

Conflict preemption occurs "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Puritan Med. Prods. Co., 2018 ME 90, ¶ 13, 188 A.3d 853 (quoting *English v. Gen. Elec. Co.*, 496 U.S. 72, 79 (1990)). In considering obstacle preemption, courts must examine "the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." *Jones v. Rath Packing Co.*, 430 U.S. 519, 527 (1977); *see also Puritan Med. Prods. Co.*, 2018 ME 90, n.12, 188 A.3d 853 ("Courts regularly employ a case-by-case analysis in issues of conflict preemption."). This Court has explained that, "[i]n determining whether a state statute hinders the achievement of federal policy, courts must first ascertain Congress' objectives and then decide whether a conflict exists." *Bayside Enter., Inc.*, 513 A.2d at 1358. The Supreme Court has likewise described this analysis as "essentially a two-step process of first ascertaining the construction of the [state and federal laws] and then determining the constitutional question whether they are in conflict." *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981) (quoting *Perez v. Campbell*, 420 U.S. 637, 644 (1971). "[A] court's concern is necessarily with 'the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted.'" *Id.* (quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 243 (1959)).

The doctrine of field preemption applies where a framework of federal regulation is "so pervasive that Congress left no room for the States to supplement it or where there is a federal interest so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Wood v. United*

States, 1:14-cv-00399-JDL, 2016 WL 11580579 at *10 (D. Me. Feb. 2, 2016) (quoting *Arizona v. United States*, 567 U.S. 387, 399 (2012)). Courts may infer Congress's intent to occupy a field to the exclusion of state law "where the pervasiveness of the federal regulation precludes supplementation by the States, where the federal interest in the field is sufficiently dominant, or where "the object sought to be obtained by the federal law and the character of obligations imposed by it ... reveal the same purpose." *French v. Pan Am Exp., Inc.*, 869 F.2d 1, 2 (1st Cir. 1989) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947).

There does not appear to be any dispute about these foregoing principles. Rather, Appellant contends that the trial court misapplied these undisputed principles for three reasons. Appellants are incorrect in all three respects.[2]

I. A state tort action seeking to remove the very safety measures that the FAA specified as a result of its detailed mandatory process interferes with the exclusive federal regulatory scheme designed to ensure airspace safety.

Appellants' principal argument on appeal is that there can be no preemption because FAA hazard determinations are just "advisory" or "recommendations" that have "no enforceable legal effect." (Blue Br. at 12-14) Appellants take these quotes out of context, leading them to understate the import of the hazard determinations and the underlying regulatory regime. It is not as if the FAA does not care whether

[2] The Blue Brief contains seven separately numbered headings, but argument I is just the general law of preemption and arguments IV, V and VII do not appear to be independent arguments. We address these latter three arguments along with the Blue Brief's Argument II in Part I, below.

CMP follows its safety determinations. Rather, as explained in more detail below, the FAA has a detailed and mandatory process to promote airspace safety, and the fact that it relies on the practical ramifications of its decisions and moral suasion to induce compliance rather than asserting enforcement authority does not lessen the interference with the federal scheme that would follow from state court tort actions seeking to require non-compliance with the FAA's safety determinations.

A. The claims here would interfere with the federal regulatory scheme because they would allow states to require non-compliance with the safety measures that are the very point of the comprehensive system.

1. Congress delegated to the FAA exclusive jurisdiction over the airspace, including airspace safety, and the FAA has exercised that authority to develop a detailed system for determining whether structures such as towers interfere with air safety.

The Federal Aviation Act (the "Act") declares that the "United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103. The Secretary of Transportation[3] is authorized to review "structures interfering with air commerce." 49 U.S.C. § 44718. To facilitate this review, the Secretary "shall require a person to give adequate public notice, in the form and way the Secretary prescribes, of the . . . proposed construction . . . of a structure" when the notice will promote "(1) safety in air commerce; and (2) the efficient use and preservation of the navigable airspace." *Id.* § 44718(a).

[3] The FAA is an administration in the Department of Transportation. 49 U.S.C. § 106.

If the Secretary determines that a proposed structure "may result in an obstruction of the navigable airspace or an interference with air navigation facilities and equipment or the navigable airspace," the FAA must "conduct an aeronautical study to decide the extent of any adverse impact on the safe and efficient use of the airspace, facilities, or equipment." *Id.* § 44718(b)(1). In an aeronautical study conducted under section 44718(b), the Secretary is required to "consider factors relevant to the efficient and effective use of the navigable airspace." *Id.* The Secretary must thereafter issue a report disclosing any "adverse impact on the safe and efficient use of the navigable airspace that the Secretary finds will result from constructing or altering the structure" subject to the aeronautical study. *Id.* § 44718(b)(2). The Act does not express any limitation on the Secretary's discretion to determine when a structure "may result in an obstruction of the navigable airspace," and has left entirely to the FAA the discretion to determine what constitutes an "adverse impact" on the safe and efficient use of the navigable airspace.

The FAA has promulgated extensive regulations to implement these requirements, divided into subparts. 14 C.F.R. § 77.1, *et seq*. As is pertinent here, Subpart B requires notice to the FAA of certain intended construction, Subpart C sets forth standards by which the FAA is to determine whether such construction would create an obstruction to "the use of navigable airspace by aircraft and to existing air navigation facilities," and Subpart D describes how "aeronautical studies" are to be conducted for construction of which the FAA is given notice. *Id.*

The obstruction standards of Subpart C "are supplemented by other manuals and directives used in determining the effect on the navigable airspace of a proposed construction or alteration." 14 C.F.R. § 77.25(c). One such supplementation is the FAA Safety Lighting Standards, which set "forth standards for marking and lighting obstructions that have been deemed to be a hazard to air navigation." *See* FAA Safety Lighting Standards at i. After noting that "[c]onsiderable effort and research was expended to determine the minimum marking and lighting systems or quality of material that will produce an acceptable level of aviation safety," the FAA Safety Lighting Standards "recommend[s] minimum standards in the interest of safety, economy, and related concerns." (*Id.* § 2.3) Among other things, any structure exceeding 200 feet in height "should be marked and/or lighted" unless an aeronautical study concludes otherwise. (*Id.* § 2.1) Specifically, "to provide an adequate level of safety, obstruction lighting systems should be installed, operated, and maintained in accordance with the recommended standards" set forth therein. (*Id.*) The remainder of the 91-page document then sets forth these standards in detail.

Under these regulations, any construction that will be more than 200 feet above ground level ("AGL") requires notice to the FAA and an aeronautical study. 14 C.F.R. § 77.9(a) & 77.25(a). "The purpose of an aeronautical study is to determine whether the aeronautical effects of the specific proposal and, where appropriate, the cumulative impact resulting from the proposed construction or alteration when combined with the effects of other existing or proposed structures, would constitute a

hazard to air navigation." 14 C.F.R. § 77.25(b). In conducting an aeronautical study, FAA personnel must follow the FAA Procedures for Handling Airspace Matters (the "FAA handbook").[4] Following the study, the FAA is to determine whether the construction would present a hazard to air navigation. *Id.* § 77.31(a). The FAA may make this no hazard determination conditional. *Id.* § 77.31(d)(1).

2. Allowing a state tort action to require non-compliance with the safety determination resulting from this detailed process would stand as an obstacle to the statutory and regulatory scheme's purpose of promoting airspace safety.

Appellants concede that the foregoing process was mandatory here and resulted in the FAA issuing a determination that the towers would not be hazards so long as they employed the specified safety lighting. Yet, Appellants' position is that private litigants by means of a state law tort action should be allowed to force CMP not to follow the safety determination that comes from that mandatory federal process. It is hard to conceive of something that is more of an "obstacle" to the purpose of the federal scheme – protecting safety – than allowing a state to require removal of the very safety measures that result from the federal process.

Under well-established jurisprudence, this Court and others have held that preemption applies "where state law stands as an obstacle to the accomplishment and execution of the full *purposes* and *objectives* of congress." *Puritan Med. Prods. Co.,* 2018 ME 90, ¶ 13, 188 A.3d 853 (emphasis added); *see also Bayside Enter., Inc.*, 513 A.2d at

[4] FAA Order JO 7400.2G, available at https://www.faa.gov/documentLibrary/media/Order/7400.2G.pdf.

1358 ("In determining whether a state statute hinders the achievement of federal policy, courts must first ascertain Congress' objectives and then decide whether a conflict exists."). Nothing in these standards is contingent on the precise manner of federal regulation, but on the purposes and objectives the federal scheme is intended to accomplish. *See San Diego Bldg. Trades Council, Millmen's Union, Loc. 2020 v. Garmon*, 359 U.S. 236, 245 (1959) ("judicial concern has necessarily focused on the nature of the activities which the States have sought to regulate, rather than on the method of regulation adopted"). To allow state law liability for complying with an FAA safety standard would plainly hinder the federal policy of promoting airspace safety.

This case is a perfect example. The mandatory federal regulatory process resulted in a determination that CMP should use lights to keep planes from crashing into the towers. Appellants want the Court to order CMP to take down those lights. If allowed to do so, this would directly interfere with the federal purpose of promoting air safety by removing the safety measures that the FAA specified. That is classic obstacle preemption. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995); *Arizona v. United States*, 567 U.S. 387, 402 (2012) (obstacle preemption would apply if a state had "power to bring criminal charges against individuals for violating a federal law even in circumstances where federal officials in charge of the comprehensive scheme determine that prosecution would frustrate federal policies); *Verizon New England, Inc. v. Maine Pub. Utils. Comm'n*, 509 F.3d 1, 9 (1st Cir. 2007) (where Federal Communications Commission policy authorized telecommunications carriers to

charge potentially higher just and reasonable rates to limit subsidization and encourage competition, states could not require carriers to charge lower rates); *Remington v. J.B. Hunt Transp., Inc.*, No. CV 15-10010-RGS, 2016 WL 4975194, at *4 (D. Mass. Sept. 16, 2016) ("What is explicitly permitted by federal regulations cannot be forbidden by state law.").

Consider the situation CMP would be in if it erected the towers without the very safety requirements specified by the expert regulators, and then a plane crashed into it. It does not take a lot of imagination to picture the use plaintiff's counsel would make of the Conditional NHD in the ensuing wrongful death action. *Cf., e.g., Smith v. Tennessee Valley Auth.*, 699 F.2d 1043, 1045 (11th Cir. 1983) (vacating dismissal of action against utility premised on utility's failure to properly mark power lines, resulting in injuries to the pilot of a low-flying aircraft); *McCauley v. United States*, 470 F.2d 137, 138 (9th Cir. 1972) (affirming trial court determination that failure to mark power lines constituted negligence).

This is, in fact, the exact concern that the Supreme Court articulated in *Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 875 (2000). There, plaintiff, who had been injured in a car accident, sought to hold the car manufacturer liable for failing to equip his vehicle with an airbag. The National Transportation Safety Board had promulgated standards permitting, but not requiring, airbags in vehicles manufactured prior to 1987, as part of a broad policy approach that accounted for the balancing of industry, safety, and economy. *Id.* The Court explained that the policy of preemption

is necessary even where Congress had not expressly preempted state tort suits. *Id.* at 871. In the absence of preemption, states could premise liability on a party taking the very action that the federal government was promoting, thus directly undermining the federal purpose. *Id.* This is precisely what Plaintiffs would ask this Court to permit here.

In an effort to make the removal of safety measures seem more palatable, Appellants at one point suggest that the safety measures are not really necessary at all. (Blue Br. at 21-23) What the FAA specified, however, is not some unusual approach like the Appellant's hypothetical pink blimp. By regulation, towers over 200' like the ones here require safety measures. 14 C.F.R. §§ 77.5, 77.9. The FAA specified compliance with its standard lighting safety measures. If Appellants had wanted to challenge the specific measures required, they were free to intervene in the FAA process and make that request to the expert regulators themselves, rather than asking a court to guess at whether some lesser measure would be sufficient. 5 U.S.C. § 555(b) ("So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function.").

3. As the FAA itself has said, this detailed regulatory scheme occupies the field of determining the measures necessary to ensure airspace safety with respect to tall structures.

Though this Court need never reach the issue given the existence of obstacle preemption, Appellants' claims are also barred by field preemption because the federal government has occupied the field of the measures necessary to ensure airspace safety of tall structures. In the words of the FAA in the context of a tall broadcast tower, "it is the position of the FAA that the Federal Aviation Act occupies the field regarding the question whether a proposed broadcast tower would constitute a navigable hazard." (A.139) The FAA is correct.

Pursuant to 49 U.S.C. § 40103, "[t]he United States Government has exclusive sovereignty of airspace of the United States." Congress explicitly recognized the threat that tall structures might pose to air safety and specifically required the FAA to develop a process for ensuring that any such structures did not adversely affect air safety. 49 U.S.C. § 1501 & 44718. The FAA carried out these mandates with the detailed regulatory process described in Part I.A.1, above. In light of this extensive grant of exclusive authority and the detailed regulatory process to ensure air safety, courts throughout the country have routinely held that the Act preempts state attempts to regulate air safety, as the trial court found. *E.g., City of Burbank v. Lockheed Air Terminal*, 411 U.S. 624, 634 (1973) (holding that a municipal ordinance assigning curfew to airplane takeoffs and landings was preempted by the Federal Aviation Act because it had an impact on airspace congestion and therefore safety); *Greene v. B.F.*

Goodrich Avionics Sys., Inc., 409 F.3d 784, 795 (6th Cir. 2005) ("We agree . . . that federal law establishes the standards of care in the field of aviation safety and thus preempts the field from state regulation."); *Airline Pilots Ass'n, Int'l v. Quesada*, 276 F.2d 892, 894 (2d Cir. 1960) (explaining that the Federal Aviation Act "was passed by Congress for the purpose of centralizing in a single authority—indeed, in one administrator—the power to frame rules for the safe and efficient use of the nation's airspace."); 8A Am. Jur. 2d Aviation § 25 (collecting cases and explaining, "[d]ue to concerns for safety, efficiency and protection of people on the ground, aviation requires a uniform and exclusive system of federal regulation if the congressional objectives underlying the Federal Aviation Act are to be fulfilled.").

These conclusions are consistent with the legislative history of the Act. Congress relied, in passing the Act, on a Senate Report which explained that "aviation is . . . the only [industry] whose operations are conducted almost wholly within federal jurisdiction, and are subject to little or no regulation by States or local authorities." S. Rep. No. 1811, 85th Cong., 2d Sess. 5 (1985). The House likewise explained in passing the Act that it intended to give "[t]he Administrator of the new [FAA] . . . full responsibility and authority for the advancement and promulgation of civil aeronautics generally, including promulgation and enforcement of safety regulations." H.R. Rep. No. 2360, 1948 U.S.C.C.A.N. 37741.

In 2001, the District of South Dakota relied on this legislative history and the Supreme Court's reasoning in *City of Burbank*, 411 U.S. at 633, in enjoining a state

aeronautics commission from acting to prohibit construction of broadcast towers after the FAA had issued a notice of determination of no hazard. *Big Stone Broad., Inc. v. Lindbloom*, 161 F. Supp.2d 1009. The court summarized its reasoning as follows:

> [B]ecause of the broad legislative scheme, the detailed regulations adopted pursuant to that scheme, the required cooperation and coordination of the FAA and FCC, the legislative history, and the FAA's own interpretation, the court concludes that the Act and the regulations promulgated in connection with the Act, preempt the field of air traffic and safety as to radio broadcast towers.

Id. at 1020. Although the court in *Big Stone* explained that it would have come to the same conclusion even without input from the FAA itself, *see id.*, the court found persuasive the amicus brief filed by the FAA, noting the FAA's view that it occupied the field of hazard determinations. (A.139)

Appellants' attempt to have a Maine court second guess the FAA's determination of what is necessary to ensure airspace safety and elevate a few private litigants' desires over the safety of the general public fails for this independent reason.

B. The interference with federal law is no less substantial just because the FAA relies on practical realities rather than direct enforcement actions to ensure compliance with its safety determinations.

Appellants' principal response to the foregoing is to say that the FAA's no hazard determinations are of "no enforceable legal effect" or "advisory." (Blue Br. at 12-14) The implication that Appellants seek to draw from these out of context quotes – that there can be no interference with federal law because the FAA's hazard determinations are essentially meaningless – is not warranted.

The quotes on which Appellants rely are largely made in the very different context of standing or takings cases. *E.g.*, *Town of Barnstable Mass. v. F.A.A.*, 659 F.3d 28, 31-32 (D.C. Cir. 2011) (addressing standing); *Michigan Chrome & Chem. Co. v. City of Detroit*, 12 F.3d 213 (6th Cir. 1993) (addressing a takings claim). The "no enforceable legal effect" language traces back to an argument first made by the FAA fifty years ago (and rejected by every court to have considered it) that its hazard determinations were not reviewable in court. *See AOPA Int'l v. Dep't of Transp.*, 446 F.2d 236, 240 (5th Cir. 1971). Similarly, the FAA's "advisory" language in § 2-1.2 of Order 1050.1 addresses when review is necessary under the National Environmental Policy Act. Statements made in those contexts do not stand for the proposition that there can be no interference because the process is unimportant. It is one thing to say, for example, that a person has standing to challenge an FAA hazard determination even though the FAA does not claim the right to obtain an injunction stopping construction. It is quite another to say that there is no interference with federal law because this lack of enforcement authority renders the FAA process so without meaning that states should be free to directly overrule its results.

Indeed, the very cases Appellants cite demonstrate that FAA hazard determinations have other real, practical effects on whether lenders will lend money, insurers will provide insurance, local authorities will issue permits, and so forth. *E.g. Town of Barnstable, Mass.*, 659 F.3d at 32 (explaining that an FAA determination of hazard would thwart construction of 130 wind turbines, as the U.S. Department of

Interior had conditioned its lease on obtaining a determination of no hazard, and "would rethink the project if faced with an FAA determination that the project posed an unmitigable hazard"); *BFI Waste Sys. of N. Am., Inc. v. F.A.A.*, 293 F.3d 527, 532 (D.C. Cir. 2002) (explaining that despite the absence of any "enforceable legal effect" petitioners had standing to challenge an FAA determination because "a hazard determination can hinder the project sponsor in acquiring insurance, securing financing or obtaining approval from state or local authorities"); *see also Commonwealth v. Rogers*, 430 Pa. Super. 253, 268, 634 A.2d 245, 253 (1993) (explaining that a Pennsylvania statute empowering the state department of transportation to enforce FAA hazard determinations "ensure[d] that the safety regulations promulgated by the FAA are applied uniformly . . . to establish a minimum threshold of safety"); *White Indus., Inc. v. F.A.A.*, 692 F.2d 532, 533 n.1 (8th Cir. 1982) ("Although the FAA determination has no enforceable legal effect, it does have substantial practical impact."); *Aircraft Owners & Pilots Ass'n v. F.A.A.*, 600 F.2d 965, 967 (D.C. Cir. 1979) ("The FAA is not empowered to prohibit or limit proposed construction it deems dangerous to air navigation. Nevertheless, the ruling has substantial practical impact.").

The closest Appellants come is *Carroll Airport Commission v. Danner*, 927 N.W.2d 635, 653 (Iowa 2019), but that case does not stand for the proposition that the FAA's lack of enforcement authority for its determinations of no hazard permits state and local entities to undermine the safety standards on which those determinations are

based. Instead, *Carroll* involved a situation where the local law imposed a more stringent safety requirement than did the no hazard determination, in that case refusing to allow a tall tower despite being authorized by the FAA so long as lighting was used. *Carroll* does not involve an effort to cause a party to stop using a safety measure, but instead an effort to require greater safety measures. As a result, it does not create an obvious interference with the federal purpose and is thus readily distinguishable. *Id.* Put another way, in this case, the Court need not resolve the issue of whether federal law precludes a state law effort to regulate more stringently, but only whether it precludes a state effort to undermine a federal safety determination.

In short, as the Fifth Circuit succinctly observed, "[t]o say . . . that the FAA's determination on the question of hazard is either practically, administratively, or legally insignificant is to ignore reality." *Air Line Pilots Ass'n Int'l v. Dep't of Transp., F.A.A.*, 446 F.2d 236, 241 (5th Cir. 1971). The interference with federal law remains the same even though the FAA relies on these practical realities rather than direct enforcement authority to promote compliance with its decisions.

C. Appellants can identify no case allowing a state law to require non-compliance with a safety measure specified by a conditional no hazard determination.

Appellants devote a whole section of their brief to noting that there are also cases rejecting arguments that the Act preempts some state law. (Blue Br. at 18-19) But Appellants cite zero cases authorizing a state to disallow a safety measure specified by the FAA. Most of the cases Appellants cite are land use cases that do not

implicate safety at all. CMP agrees that the Act does not preempt land use rules that do not affect air safety. In fact, as Appellants note, the Conditional NHD itself says that CMP is not relieved of its obligation to comply with other laws, one of the most obvious examples of which is local zoning laws. Those cases, and that notation in the Conditional NHD, say nothing about the relevant issue here because they do not involve any interference with the federal purpose of promoting airspace safety.

D. There is no inconsistency between the trial court's finding of field preemption and its recognition that state law actions are permissible based on noncompliance with a hazard determination.

Though the Court need not address it at all if its agrees that obstacle preemption bars the claims here, Appellants are not correct that there is an inconsistency between the trial court's finding of field preemption and its recognition that there can be state law actions based on noncompliance with the hazard determinations. (Blue Br. at 18-19) Field preemption is a question of Congressional intent. Here, unlike in *Arizona*, the trial court did not find that Congress intended to preempt the field of enforcement decisions. Rather, the trial court found that the comprehensive system for determining whether a particular structure was hazardous indicated an intent to occupy that field, *i.e.* the field of airspace safety standards for structures but not the field of the remedies available for breaches of those standards. (A.37)

II. The FAA's authority is not limited to the "navigable airspace."

Appellants criticize the trial court's statement that the FAA has authority over airspace. (Blue Br. at 15-17) Yet, Appellants expressly concede that the FAA has authority over "airspace necessary to ensure the safety of aircraft" and they seem to concede that the FAA has authority to conduct the assessment leading to the Conditional NHD. (Blue Br. at 17) Since it is that determination that leads to preemption here, it makes no difference what the extent of the FAA's other regulatory authority is. Appellants' whole argument in this respect thus seems to be beside the point.

In any event, as one might expect given the extensive regulations that have been in place for decades, Appellants' argument that the FAA does not have relevant authority is incorrect. The FAA was specifically directed by statute to develop the very hazard assessment process that it undertook here. 49 U.S.C. § 44718; 14 C.F.R. § 77. And, more broadly, 49 U.S.C. § 40103(b)(1) authorizes the FAA to ensure the safe and efficient use of all airspace:

> The Administrator of the Federal Aviation Administration shall develop plans and policy for the use of the navigable airspace and <u>assign by regulation or order the use of the airspace necessary to ensure the safety of aircraft and the efficient use of airspace</u>.

(emphasis added.) It is thus crystal clear that the FAA indeed has authority over all airspace in order to ensure the safe and efficient use of that airspace, just as the trial court found.

Indeed, since the "navigable airspace" by definition begins above the tallest structure, 49 U.S.C. § 91.119, the FAA has to have authority to assess and regulate structures in the airspace below navigable airspace. Otherwise, it would have no ability to regulate structures at all – however tall a structure was, navigable airspace would be above it and the FAA would be without authority to regulate it. That makes no sense, and certainly Appellants cite no authority finding that the detailed regulatory process resulting in the hazard determinations is beyond the FAA's authority.

None of this means that there can never be a nuisance above ground, as Appellants contend. Just because the FAA has jurisdiction beyond the "navigable airspace" does not mean that states have no ability to regulate anything at all that happens within that airspace. It just means they cannot regulate within the field of airspace safety or in any way that creates an obstacle to the purposes of the federal regulatory scheme. If one created a nuisance by throwing objects into a neighbor's yard, for example, that would involve the airspace but would obviously not implicate airspace safety or interfere with the federal regulatory scheme in any way. Such a claim would thus not be preempted.

III. There is no basis to say that CMP is not in compliance with federal law.

Characterizing the flash rate on the CMP towers as violating FAA standards, Appellants contend the trial court did not allow them to pursue a case for noncompliance with federal standards. (Blue Br. at 20-21) But the document they cite as purportedly establishing the standard is not a standard at all but a research

study with this disclaimer: "The findings and conclusions in this report are those of the author(s) and do not necessarily represent the views of the funding agency. This document does not constitute FAA Aircraft Certification policy." (CMP Reply Br. at Exhibit A at p. 2.) It is certainly not a requirement of the Conditional NHD.

CONCLUSION

At the end of the day, common sense dictates the result here. State courts cannot be in the business of forcing companies not to use the safety measures specified by the expert regulators after extensive mandatory process, thereby endangering the lives of plane passengers. This Court should affirm the Superior Court's order dismissing with prejudice Appellants' claims for nuisance on the ground that the Federal Aviation Act and the regulations promulgated thereunder preempt such claims.

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CERTIFICATE OF SERVICE

I, Matthew Altieri, Esq., hereby certify that two copies of this Brief of Appellee Central Maine Power Company were served upon counsel at the address set forth below by email and first class mail, postage-prepaid on July 8, 2021:

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